

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GEORGIA-PACIFIC CONSUMER
PRODUCTS, LP; FORT JAMES
CORPORATION; and GEORGIA-PACIFIC,
LLC,

Plaintiffs,

DOCKET NO. 1:11-cv-483

vs.

NCR CORPORATION; INTERNATIONAL
PAPER COMPANY; and WEYERHAEUSER
COMPANY.

Defendants.

TRANSCRIPT OF NCR's MOTION TO COMPEL SUPPLEMENTAL
INTERROGATORY RESPONSES FROM PLAINTIFF GEORGIA-PACIFIC
RE UNITED STATES MAGISTRATE JUDGE HUGH W. BRENNEMAN, JR.

GRAND RAPIDS, MICHIGAN

October 8, 2014

Court Reporter: Glenda Trexler
Official Court Reporter
United States District Court
685 Federal Building
110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

Proceedings reported by audio recording, transcript produced by computer-aided transcription.

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17 Grand Rapids, Michigan

18 October 8, 2014

19 10:09 a.m.

20 PROCEEDINGS

21 *THE COURT:* It's getting a little scary when all your
22 faces begin to look so familiar. I hope you're all enjoying
23 Art Prize. You're here often enough you ought to be voters.
24 You get to vote, you know, if you register. And perhaps some

1 of you were up this morning first thing looking at the eclipse
2 of the moon. I was out trying to take pictures of that, but
3 I'm afraid they didn't come out too well. But more likely you
4 were up getting ready for this motion this morning, reading
5 these briefs over one more time. So we'll try to get this done
6 with dispatch.

7 Now, this is the latest Motion to Compel, docket
8 number 575 for the record, and this is NCR's motion to compel
9 supplemental interrogatory responses from plaintiff
10 Georgia-Pacific.

11 I've had the opportunity to go through both the
12 motion and the plaintiff's opposition to that motion. We're
13 trying to keep this on a fast track for obvious reasons. My
14 experience with discovery motions has generally been to first
15 of all give the parties an opportunity to state their
16 respective positions so we know where we're going, but
17 ultimately we have to look at each issue -- or each discovery
18 request to see what's been sought and then what's been supplied
19 in response to it.

20 This matter arises out of the previous motion we
21 heard last time we were all here regarding interrogatories by
22 NCR to International Paper. The responses by
23 International Paper were considerably different than the
24 responses by Georgia-Pacific, and so it might call for a bit of
25 a different approach, I think. And really in that instance the

1 overall positions of the parties were quite helpful because
2 there really were not that many responses by
3 International Paper to really look at.

4 Here that's not the case. Georgia-Pacific has made a
5 number of specific responses. So I think that now that I have
6 some feel for the overall positions of the parties, rather than
7 simply rehash those since I've had a chance to read the briefs,
8 it might be more productive to get right into the individual
9 interrogatories and look at what was requested and what was
10 produced in response to what was requested. Because despite
11 what the parties might want or believe they have produced or
12 believe their responsibilities are, the Court can only look at
13 the request itself to see what's sought and then see what was
14 supplied in response to that. Anything outside of that is
15 between the parties. Any other understandings you have and so
16 forth is between the parties. So the Court sits to enforce
17 what the federal rules require.

18 With that in mind, I would invite NCR to point out
19 the interrogatories that remain at issue, since I think you
20 said that you had tried to discuss each of these with
21 Georgia-Pacific and were unable to come to a resolution. As is
22 your obligation under our local court rule, to talk about each
23 one of these, as you know. And tell me which ones are at issue
24 and we'll go through them one by one. And normally it helps
25 to, I find, have the other side respond on a one-by-one basis

1 so we don't get too confused.

2 Counsel.

3 **MR. MARRIOTT:** Thank you, Your Honor.

4 R. David Marriott for NCR. Mindful of the Court's more
5 specific direction that I, candidly, anticipated as a start to
6 this, I want to be as responsive as I can. At the same time
7 we've prepared, because it seemed to be helpful last time, a
8 little handout. If I may hand it out to Your Honor and to
9 counsel.

10 Your Honor, what I -- just so I set the stage -- and
11 I'll come to Your Honor's very specific question -- what I had
12 contemplated doing was making four points. And the first
13 point -- and you can see those laid out at page 2 of this
14 handout -- and it was first simply that we believed Your Honor
15 did rule on this question.

16 Georgia-Pacific makes two arguments in its opposition
17 papers. One is that they have fully complied with the
18 interrogatories as they were framed. And so my second point
19 here was going to be, and still is going to be, that that in
20 fact is not true. The second point they make and really their
21 final point is that NCR ought not be able to make these
22 interrogatory requests at all because we have not, they say,
23 asserted a divisibility defense in the case.

24 And my final point was going to be about
25 reconsideration being unwarranted.

1 Let me, if I may, mindful of Your Honor's remarks,
2 just skip if I could to the second section. I'll circle back.
3 I want to be as responsive as I can to your very direct
4 question. But if you turn, Your Honor, to page 6, I would like
5 to generally characterize their answers, and then I'm happy to
6 go interrogatory by interrogatory and discuss what it is about
7 them we believe to be the deficiency. As I think Your Honor
8 will see, however, our belief is the deficiency runs
9 continually throughout most of them, so I think several
10 examples ought to be sufficient, but I'm certainly happy to go
11 through every single one of them.

12 The basic problem here, Your Honor, is that in its
13 responses to our interrogatories what Georgia-Pacific has
14 largely done is to assert an objection that it will not provide
15 information protected by the work product privilege or the
16 attorney-client privilege. That's the same objection that was
17 asserted by International Paper. Your Honor, dealt with that
18 objection I believe at the last hearing in ordering answers to
19 the interrogatories. They assert that they ought not have to
20 respond to any of the interrogatories except as they relate to
21 mills owned by Georgia-Pacific.

22 Your Honor may recall that Georgia-Pacific owned or
23 operated four of the 14 mills, and they take the position in
24 their opposition papers and in their responses to objections
25 more particularly that they ought not have to respond to any

1 requests relating to any mill not owned by them. Irrespective
2 of whether they will make contentions about what happened at
3 that mill during the trial of the case.

4 And then basically what they do in addition to that,
5 Your Honor, is point NCR to collections of documents produced
6 in the case. They point us to documents produced in the prior
7 litigation, the so-called KRSG litigations of which there were
8 several. They point us to documents produced during the first
9 phase of this case. Indeed in response to several of the
10 interrogatories what they have done is to point us to the
11 entirety of the trial transcripts in the first part of the
12 case.

13 The answers of Georgia-Pacific to be absolutely clear
14 as it comes to referring specifically to documents are superior
15 to the answers of International Paper. As Your Honor knows now
16 better than I, the International Paper responses basically
17 referred us to 4 million pages of paper without much additional
18 description. The Georgia-Pacific answers are more specific.
19 But fundamentally at the end of the day we're left in precisely
20 the same position. They have taken more time to write
21 narratives about what's in the documents, but they are at the
22 end of the day really simply referring us to documents that
23 touch the topic of the interrogatory rather than answer the
24 interrogatory. Indeed many of the documents by their own
25 acknowledgment absolutely do not answer the questions that we

1 have put to them. They say in their responses and objections
2 that the answers are, in their words, impossible, and then they
3 add to it that they will tell us more -- they will tell us what
4 their contentions are with respect to those topics at the trial
5 of the case. And that is fundamentally the problem. And I
6 believe that's what -- and I obviously don't speak for
7 Your Honor, but I believe having sat through the last hearing
8 that what fundamentally was behind the Court's order was a
9 concern that the parties weren't disclosing contentions of one
10 another during discovery at a time when follow-up discovery
11 could be taken. And so while the Georgia-Pacific answers give
12 us more -- they give us some more particularity in pointing out
13 documents, which is not surprising since they have been in
14 litigation involving this river for about 20 years, we get a
15 little bit more particularity, but we don't get any answers
16 really to the questions. We don't know what their contentions
17 are any more than we know what the contentions of
18 International Paper are. So while I agree they are more crafty
19 in their responses to the interrogatories by being specific, by
20 providing text and narrative text, substantively it really
21 makes no difference. They have been no more forthcoming with
22 respect to their contentions about the key issues than has
23 International Paper.

24 And perhaps we can take an example. Why don't we
25 start at the beginning and start with interrogatory number 1.

1 And you'll see that this is described in part at page 6 of my
2 handout, Your Honor, but interrogatory number 1 asks that
3 Georgia-Pacific disclose the amount of carbonless copy paper
4 that was recycled at the mills of the site.

5 This is fundamentally a case about who ought to be
6 responsible for cleaning up the PCBs that were put into the
7 river as a result of recycling of carbonless copy paper. So we
8 have said to them -- since they are 14 mills and responsibility
9 we believe will vary by mill, we have said, All right, so which
10 of the mills contributed carbonless copy paper and in what
11 amounts? And their answer to that, Your Honor, is -- after a
12 series of objections -- let me just so I don't in any way
13 misstate it, let me just get the precise response.

14 *THE COURT:* It would be helpful, I think, to point to
15 the interrogatory -- one of the exhibits so we have the actual
16 interrogatory in front of us as well as their answer, if you
17 could do that.

18 *MR. MARRIOTT:* Sure. So this is Exhibit B,
19 Your Honor, to NCR's motion. Exhibit B includes at page 6
20 interrogatory number 1.

21 *THE COURT:* Uh-huh.

22 *MR. MARRIOTT:* So at page 6 you see interrogatory
23 number 1, and what we've asked is for them to please identify
24 by year and by mill the carbonless copy paper recycled at the
25 site. How much did you recycle? That's the way we figure out

1 how many, if any, PCBs went from that mill into the river and
2 what ought to be cleaned up. And their response is -- if you
3 take their first paragraph, they say they object because it's
4 work product and it's privileged and it reveals, you know,
5 their questions, and they said they won't respond for that
6 reason. And they basically make their objection in the second
7 paragraph that says "We ought not to have to respond to
8 anything except Georgia-Pacific, because we had four mills and
9 we don't want to answer as to any of the other mills." That's
10 essentially what that says.

11 And then you have the third paragraph where they say
12 that we're as able as they are to look at the documents and
13 tell them what the documents say. And then they come to their
14 answer. And what they say in their answer in the very first
15 line is "Due to the absence of comprehensive records
16 documenting types of wastepaper purchased by each mill, it's
17 impossible to state precisely how much CCP each mill at the
18 site recycled during any given year during the relevant
19 period." So they begin by saying, "We can't answer the
20 question, not possible to answer the question," and then they
21 go on essentially over the course of the next sentence,
22 "Available evidence, nonetheless, establishes conclusively that
23 substantial quantities of CCP, considerable amounts are there."

24 Their position basically is, Your Honor, that because
25 in phase 1 Judge Jonker found that there was some carbonless

1 copy paper that originated the judge found from NCR at the
2 site, somehow the inquiry is over. The Court found there's
3 some considerable amount there, we get no -- we get no
4 opportunity to demonstrate that the carbonless copy paper at
5 any particular mill can't be attributed to us or we ought not
6 be responsible for it. So they basically say the Court has
7 said there's considerable amounts. That, of course, doesn't
8 answer the question about how much there was at any particular
9 mill and whether that carbonless copy paper could have resulted
10 in the discharge of PCBs.

11 **THE COURT:** You said they owned four of the 14 mills.
12 Why would they necessarily know the answers to those questions
13 as to the other 10 mills?

14 **MR. MARRIOTT:** Well, it's less that they know the
15 answer, Your Honor, and more that they are going to what the
16 trial in the case made contentions with respect to it.

17 **THE COURT:** But that's not what you're asking in
18 interrogatory number 1. You don't ask "What do you contend the
19 mills produced?" You are asking a factual question that's not
20 a contention as such. You're saying, "Please identify by year
21 and mill the amount of CCP recycled at the site, each of these
22 sites during the relevant period."

23 **MR. MARRIOTT:** You're absolutely right. That's the
24 language said. And this is the subject we discussed to some
25 degree at the last hearing. And what we -- what I said then

1 and I guess what I will repeat now is that that is exactly what
2 it says. What we understand is that the parties, because these
3 events took place a long time ago, may not have people who have
4 personal knowledge of them. What we want is them to tell us
5 what the actual facts are. To the extent they don't actually
6 know the facts but are going to make arguments and contentions
7 about them at trial, we think the subset included within
8 knowledge is that piece of information. What is it that you're
9 going to say about it? So if you don't actually know, to the
10 extent you have somebody who was there, who lived it, where you
11 have records that demonstrate it, then tell us what it is that
12 happened at a particular mill. Answer that question.

13 And then they prepared indeed extensive
14 questionnaires that to some degree answered these questions, so
15 to some extent they can tell us that. But what we want to
16 know, Your Honor, about that is what are their contentions
17 about what happened at each mill. We don't want to have to go
18 to a trial and find out that we're going to go there having
19 been told by them now that there's been considerable amount of
20 carbonless copy paper and that's all we need to know and then
21 go to trial and have them say, "Well, here's what happened at
22 each mill. Here's the amount that was recycled of carbonless
23 copy paper, here's the amount of PCBs that went into the river.
24 This is where it came from." And that from these answers is
25 exactly what we believe -- and we'll see that, I think, more as

1 we go on -- that they are going to do. So, in other words, we
2 believe that the broader request to identify the amount of CCP
3 recycled includes in it the lesser request to at least tell us
4 what your contention is. And I believe that's what Your Honor
5 ruled that ought to be the case with respect to International
6 Paper's responses last time. Because International Paper is in
7 the same position. They had responsibility for some disputed
8 number of mills, but no more than four I think it's fair to
9 say, and they might tell you it's as few as one mill. So they
10 know what they know about the mill for which they had some
11 ownership and responsibility, and then they,
12 International Paper, like I believe all the parties, are going
13 to make arguments at trial, contentions about what it is
14 happened at the other mills.

15 So in an ordinary case where you lived and you had
16 all the facts it would be easier to provide the answer. But I
17 would say there's even more need in this case for disclosure as
18 to parties' contentions because we don't have access to the
19 contemporaneous data in a way that you would in an ordinary
20 case. Knowing the parties' contentions is that much more
21 important, because otherwise we go in almost completely blind.

22 *THE COURT:* Why didn't you ask what their contentions
23 were?

24 *MR. MARRIOTT:* Well, I guess, frankly, Your Honor, in
25 retrospect, if I had anticipated this question, we would have.

1 I believed then and I believe now that that includes the lesser
2 request of the contention. And for what it's worth, in every
3 meet and confer I've had with any party in this case from many
4 months ago, we've made it perfectly clear that that's what at a
5 minimum we are seeking: Their contentions as to what happened.
6 Because they are in some sense easy answers. "Well, how could
7 I know? It was 50 years ago." And I understand that. And if
8 they don't know that, they, I think, in fairness can say that.
9 What I think they can't in fairness do is to say they don't
10 know and then discover later in whatever fashion with their
11 experts or just as the lawyers sit around to figure out their
12 arguments or what their position about it is going to be.
13 Because then we truly get to a trial where we don't -- we've
14 had no meaningful opportunities, no opportunity really to take
15 discovery as to what it is their contentions are with respect
16 to what happened.

17 **THE COURT:** So when does discovery close?

18 **MR. MARRIOTT:** Discovery closes on the 15th of
19 November, Your Honor. So this answer --

20 **THE COURT:** You said November?

21 **MR. MARRIOTT:** I did. If I misspoke, someone will
22 correct me. I think that's right.

23 So this answer in the second paragraph under the
24 answer goes on to point out some documents. Environmental data
25 contained in numerous technical reports. It basically says

1 there's data in reports. That's true there's data in reports,
2 but that doesn't advance the ball in any meaningful respect.
3 Much of what's referred to in these interrogatories are the
4 very questionnaires that Georgia-Pacific stood in court now
5 several months ago and told you they shouldn't have to produce
6 to the parties in the case because they weren't going to help
7 them very much. We already had the underlying documents. So I
8 mean, they've given us data, they have pointed to documents,
9 but they don't tell us -- it's as if they just took several of
10 the documents and described several of the paragraphs. That's
11 basically what this is. It's a much more sophisticated --
12 "sophisticated" is the wrong word -- it's a more artful form of
13 a response to the same interrogatory that we propounded to
14 International Paper, but in the end it's the same thing.
15 International Paper just didn't take several paragraphs to say
16 what's in the documents. But as you see when you look at these
17 descriptions of what's in the documents, it doesn't tell us how
18 much carbonless copy paper was they contend recycled at any one
19 of the mills. It doesn't tell us how much was in fact recycled
20 and it doesn't tell us what they are going to contend was
21 recycled at each mill. So we will end --

22 *THE COURT:* How would they improve on what they have
23 here as far as you're concerned?

24 *MR. MARRIOTT:* As far as I'm concerned what they
25 would do is they would prepare a little table that would list

1 the years, 1954 to 1971-ish, that's the period, and they would
2 say for each of the mills here is the amount, the quantity of
3 carbonless copy paper that we contend was recycled at that
4 mill. And what they say in this --

5 *THE COURT:* Well, as to their -- again, 10 of those
6 mills aren't even theirs, so why would they have any more
7 knowledge about those mills than you would have at this point?

8 *MR. MARRIOTT:* Well, that's a fair question. They
9 wouldn't have as to those mills necessarily any more knowledge
10 than I have except as to this critical thing: Only they know
11 what their contentions are. So as to what in fact happened, I
12 mean, I'm trying to figure out what in fact happened, and
13 everybody in the room is saying, "I don't know what happened
14 because it wasn't my mill." So I'm left with no choice but to
15 say, "Okay, tell me what you contend happened or what you're
16 going to contend happened."

17 So I get that they are not in a position today to
18 tell me with absolute certainty what happened at some mill they
19 don't own, they didn't own 50 years ago. What I believe they
20 are in a position to do -- and if they aren't in a position to
21 do it, I don't know how we can ever have a trial -- is to tell
22 me what it is they are going to say -- whether they have some
23 guy who has personal knowledge of it or not -- what they are
24 going to say actually happened at that mill at trial. What is
25 your contention about what happened? I understand someone

1 didn't live it. I understand it was 50 years ago. And I
2 understand you don't own it. But what are you going to say
3 about it? And if the answer to the question -- Your Honor, if
4 the answer to that question is "I don't know" or "I'm not going
5 to take any position on that," then I have no problem with it.
6 If they are going to say they don't know and they are going to
7 take no position on it, I think this motion -- they can say
8 that on the record and the motion has achieved its purpose and
9 we're done. The problem is they are not, I don't believe, ever
10 going to say that. Because their -- and you see that as you
11 continue on in the request. And what they really say -- and
12 they say this quite clearly in their brief -- their brief
13 declares in unequivocal terms -- let me just refer you to
14 page 8 of our little handout here -- their brief declares in
15 unequivocal terms that they have fully responded to these
16 interrogatories. I'm quoting: "Georgia-Pacific fully answered
17 every interrogatory." Next one: "Georgia-Pacific's responses
18 exhaustively answer NCR's interrogatories." Next one: "There
19 is nothing to compel." That is their position: They couldn't
20 possibly have done a better job.

21 The problem with that is if that's true, if that's
22 really their position, then they have -- then I'm perfectly
23 happy to truly take them at their word if that's going to be
24 their word. If that's true, if they fully and completely have
25 complied, if there's nothing to compel, if there's no way they

1 could have done better, then they are going to have nothing
2 further to say at trial than what they have said in these
3 interrogatories. If that's the case, then I think we have --
4 they can say that and we can move on. But I'm confident that's
5 not what they are doing, Your Honor. What they are saying is
6 "I've told you all that I can tell you, all I'm going to tell
7 you, except my contentions, and I'll tell you those later."
8 And that's why I think they are in no different --

9 *THE COURT:* It sounds like you've entered into a
10 discussion with them that has evolved from the time you asked
11 the interrogatories and you've said, "Look, I understand that
12 you don't -- can't give me all the facts because you didn't own
13 it or you didn't live it or you don't have people that lived it
14 and so forth, but I want to know what your contentions are."
15 So you've kind of evolved in your mind, and perhaps the minds
16 of everybody here, that these are contention interrogatories.
17 But they are not contention interrogatories. They are fact
18 interrogatories. Not to say you couldn't ask contention
19 interrogatories, but that's not what these are. So they can
20 say with a straight face, I would imagine, "Yes, these -- we
21 have fully complied with these interrogatories because we have
22 told you everything that we can about the answers to these
23 interrogatories by telling you by year and mill the amount of
24 CCP broke recycled at this site. Factually this is what we
25 know."

1 Now, it doesn't say "what we are going to contend,"
2 "what our arguments are going to be," but that's not what the
3 interrogatory asks. On its face that's not what it asks. It
4 may be what you all have evolved this to mean, but that's not
5 what it says. So their answer when they say "We've answered
6 the interrogatory" may well be correct.

7 **MR. MARRIOTT:** Well, I think, Your Honor, if you
8 look -- if you compare the question to the answers they
9 provide, I don't think -- I mean, I can't speak for what's in
10 their minds, but what I can do is compare the interrogatory
11 itself which says tell me what carbonless copy paper was
12 recycled in each of the years at the mills, and I can look at
13 their answer and the answer doesn't tell me as to any one of
14 the mills when the carbonless copy paper was recycled if at
15 all. They simply don't provide that. I mean, an answer to the
16 question in my mind would say, Here is the year, here is -- and
17 for this mill, mill A, that year we recycled -- that much
18 carbonless copy paper was recycled. The next year this amount,
19 this amount. A little table with a number.

20 **THE COURT:** That brings me to the second question I
21 asked you. First of all, how could they answer that as to the
22 10 mills they didn't own? I think you told me that they were
23 probably in no greater position as to those facts than anybody
24 else, including yourself. But now as to the four mills they
25 did own, perhaps you're on stronger ground here, what do you

1 think they should have provided that they didn't provide? And
2 they are going to tell me, "Look, this is the information we
3 have and we've supplied it, we've supplied it to NCR." But --

4 *MR. MARRIOTT:* Well, even --

5 *THE COURT:* What do you think they should have --
6 what more, for example? Can you give me an example? Because
7 then I'll ask them to respond to your example.

8 *MR. MARRIOTT:* Sure. May I just approach this,
9 Your Honor? I hate to.

10 *THE COURT:* Sure.

11 *MR. MARRIOTT:* So, again, if this were a
12 spreadsheet --

13 *THE COURT:* Uh-huh. Do you want a blackboard?

14 *MR. MARRIOTT:* No, this should be fine. 1954, 1955,
15 1956, 1957. I would list the years. I would say
16 Georgia-Pacific Mill 1, 2, 3, and 4. And the question is "How
17 much carbonless copy paper was recycled?" I think the answer
18 is whatever it was, 500 pounds, 500 tons. And it's a number
19 for each of those years. They had four mills. They owned and
20 operated the mills. No one is in a better position to know
21 precisely what happened at those mills, one would think, than
22 they are. And at a minimum they ought to be able to tell us
23 for their mills, the mills they owned and operated, how much
24 carbonless copy paper was recycled every year. And you don't
25 see that in the interrogatory answer. Instead what you see in

1 the interrogatory answer is, again, a general reference to
2 documents, and then you see this. If you look at the bottom of
3 page 7, all right? And I would urge a contrast between the
4 notion that they fully, completely responded, couldn't respond
5 more with this answer. They say, "The amount of CCP that any
6 particular mill may have used would vary based on the
7 production processes in place at the mill, types of paper
8 products manufactured by the mill, the production output of the
9 mill, the degree to which the mill relied on ledger grades of
10 wastepaper, the sources of the mill's secondary fiber, the
11 degree to which the mill relied upon post-consumer mixed office
12 waste, the amount of CCP that may have been found in
13 post-consumer mixed office waste, the amount of non-CCP
14 wastepaper in any given bale that may have contained paper
15 manufactured using CCP. Information potentially relevant to
16 these variables is available in documents produced in this
17 case."

18 So what they have done is basically said there's a
19 bunch of variables from which one could figure it out, good
20 luck. Go figure it out. So that not only doesn't tell us what
21 happened at their own mills, but it doesn't begin to even
22 reveal what their contentions are. I mean, it's as if --
23 Your Honor, as if you had a personal injury case and you had an
24 interrogatory that said to -- the defendant to the plaintiff,
25 "Hey, tell me what your damages are and what it is that you

1 claim, what it is that you suffered," and the answer is, "Well,
2 my injuries are very complicated. They depend on where on my
3 body the injuries occurred, how much pain I felt, how much I'm
4 out-of-pocket, how much it hurt my family and those I'm
5 associated with," without really telling you what it is we
6 really are arguing about in the case. They have identified a
7 bunch of variables which are helpful but, frankly,
8 commonsensical and not in any way a surprise to anybody, and
9 they have said from that one can figure it out.

10 **THE COURT:** What are the references here that
11 Georgia-Pacific makes to interrogatories 23 and 24 of its
12 answers to Weyerhaeuser and its requests for production of
13 documents? Weyerhaeuser apparently submitted some
14 interrogatories and requests to produce. Have you seen those
15 responses?

16 **MR. MARIOTT:** I have, Your Honor.

17 **THE COURT:** Now, of course, the Court can order those
18 be incorporated or reproduced here. If you have the answers to
19 those, that may not be necessary. Are those of any help? What
20 do those provide?

21 **MR. MARIOTT:** Well, so the short answer is they are
22 of some help, but they don't -- they likewise simply don't
23 answer the questions. And there's certainly no need from our
24 perspective for the Court to simply order them to repeat the
25 text of those interrogatories here. I take that incorporation

1 for reference for what it says. I don't quibble with that
2 device. My point is, when you follow the device and you look
3 at the answers, they don't -- there's no table in those answers
4 any more than there is a table here. So there's some more
5 references to documents, there's some references to mills other
6 than Georgia-Pacific mills, but there's no answer to the
7 question that we have asked.

8 *THE COURT:* All right. Let me ask the other side to
9 respond. Thank you. And perhaps this would be a good place to
10 start as soon as you can, Counsel.

11 *MR. SHEBELSKIE:* Thank you, Your Honor. If it please
12 the Court, Mike Shebelskie for the plaintiffs. These are fact
13 interrogatories, and Georgia-Pacific in response to each has
14 identified all the facts it knows in response to these specific
15 interrogatories. Let me make that clear.

16 I think it helps set the context, Your Honor, because
17 there's been a lot of discussion about Georgia-Pacific
18 allegedly not disclosing its contentions, not being forthcoming
19 with evidence it needs to put on phase 2 of the case as an
20 element of its claim.

21 I want to make clear that's not the case here,
22 Your Honor. In phase 1 of this trial Georgia-Pacific presented
23 evidence about substantial quantities of NCR's PCB-contaminated
24 paper that was recycled at the mills and discharged into the
25 river and other locations in the Superfund site here. Based on

1 that evidence, Judge Jonker found that NCR is a responsible
2 party, and as a consequence of that, because of its arranger
3 liability, is jointly and severally liable for 100 percent of
4 the cleanup costs, case over on their liability.

5 In phase 2 we do not have to put on evidence of the
6 amount of NCR's contaminated paper that was recycled at each
7 mill, much less on a year-by-year basis. For any purpose. And
8 we're not going to put on that evidence. That's not anything
9 we have to prove.

10 Now, NCR apparently is going to try to -- they say
11 they want to use that kind of data to minimize their liability.
12 Well, that's an affirmative defense. That is something they
13 have to prove. Now, as a matter of fact, they haven't even
14 pled that as an affirmative defense.

15 **THE COURT:** Let me stop you right there. Your
16 position is you do not have to -- do not intend to put on any
17 evidence on a mill-by-mill basis regarding the amount of
18 pollution?

19 **MR. SHEBELSKIE:** We're not going to put on a
20 mill-by-mill year-by-year quantification of the type of table
21 that NCR's counsel is positng. As we say in our interrogatory
22 answers, that's impossible. We can't do it. They can't do it.
23 No one can do it. Because the documents and data don't exist.

24 Your Honor, nobody was measuring PCB discharges from
25 these mills during the relevant time period because nobody knew

1 PCBs -- none of the mills knew that PCBs were being discharged
2 because NCR covered up that information. And the production
3 records that would show how much recycled paper -- how much
4 wastepaper the mills were buying from NCR and from various
5 brokers and other sources don't exist. Perhaps not surprising
6 because we're talking about purchases that go back into the
7 '50s that those documents don't exist. And so no party can
8 answer those questions.

9 Now, as we've shown at phase 1, and what continues to
10 be our contention and will be our consistent contention, is
11 that various of these mills recycled substantial quantities of
12 NCR's PCB-contaminated paper during the relevant time period.
13 We know that's true because there is a scattershot of documents
14 and anecdotal testimony from people saying, "Yeah, I remember
15 we bought some and we recycled some." And, of course, there's
16 the evidence of the PCBs at the site. Various mills have in
17 their landfills substantial quantities of PCBs. And there are,
18 of course, substantial quantities of PCBs in the river. We
19 know those PCBs got in those locations because of recycling of
20 NCR's PCB-contaminated papers. Nobody can say, though -- we
21 know a lot was done. We know the general time period it was
22 done. But no one can provide the type of specification that
23 they want, as they ask in these interrogatories on a
24 mill-by-mill year-by-year basis of you purchased or recycled X
25 tons of NCR's paper, as a result of that you produced X tons of

1 PCBs, and what portion of that went to the river, how many tons
2 went to the landfill on a year-by-year basis? Impossible to
3 do. And we're not going to be putting that on at trial in
4 phase 2, and we don't need to put that on trial for phase 2.
5 If anything, it is their burden to prove it. And having not
6 even pled it, they can't. And really what we have done --

7 *THE COURT:* What is going to be your contention if
8 you're not going to do that? Are you going to sit on -- rest
9 on the merits of phase 1 and say, "Look, they have polluted the
10 river. They are the arrangers. They are 100 percent
11 responsible, and looking over the overall damages" --

12 *MR. SHEBELSKIE:* Our initial position is NCR is
13 100 percent liable for the cleanup costs because basically
14 every molecule of the PCBs that were required to be cleaned up
15 in this river come from their client. There's no dispute about
16 that. We don't have to prove anything further.

17 Now, continuing, if there's going to be any
18 allocation amongst the mills, any portion of liability and then
19 any inter-mill allocation, our positions will be what are set
20 forth in these interrogatory answers. That various of the
21 mills each recycled substantial quantities of this paper and
22 each discharged substantial quantities of PCBs sufficient in
23 and of themselves to justify the cleanup. There were a couple
24 of mills that didn't recycle NCR paper, and we identified those
25 in our interrogatory answers. When you look at the complete

1 interrogatory answers that include those ones from
2 Weyerhaeuser. Because Your Honor asked about those, and those
3 interrogatories were directed specifically to the four
4 Georgia-Pacific mills, and we provided the information on
5 those. Incidentally, Weyerhaeuser has not moved to compel
6 answers on those. They understand what the facts are and what
7 our positions are on those facts. So we had been forthcoming
8 in setting forth all of our facts.

9 And, Your Honor, I want to expand further, because
10 not only do our answers incorporate the answers to
11 Weyerhaeuser's interrogatories, we incorporate our proposed
12 findings of fact from phase 1. And that obviously is already
13 in the docket there, so we didn't reproduce it because it's
14 such a voluminous document. But we set forth there all the
15 facts and all the evidence that we had about the recycling of
16 CCP, NCR's contaminated paper, at our mills. There are no
17 further facts that we can disclose. All of our documents have
18 been produced. What we know about our mills has been
19 disclosed. And we say our mills. I do also want a caveat that
20 Georgia-Pacific didn't operate all of these mills during the
21 relevant time period. There were some that Georgia-Pacific
22 acquired after the fact. So we don't have firsthand knowledge
23 of the -- the current Georgia-Pacific doesn't have firsthand
24 knowledge of even some of these four mills. So our facts have
25 been disclosed.

1 Mr. Marriott says he would like to have a table to be
2 sort of the cherry on top of the cake here of a mill-by-mill
3 year-by-year basis. We can't do it, and we won't do it at
4 trial.

5 *THE COURT:* As far as if there's a mill-by-mill
6 allocation, how do you do that at that point?

7 *MR. SHEBELSKIE:* We would say -- well, for example,
8 let's say that the mill for which International Paper is
9 responsible on Portage Creek, we know that substantial
10 quantities of NCR's contaminated paper were recycled there. We
11 know that because, again, we have a scattershot of documents
12 and testimony about people saying recycling took place there
13 and they bought some and recycled some. All of that has been
14 disclosed.

15 We also know from the variety of studies and analyses
16 that have been done that there are substantial quantities of
17 PCBs in their landfill, so we know they recycled a lot during a
18 couple-decade period. And just by the nature of the way these
19 things work, a substantial amount would have gotten into the
20 river. But how much -- can we say it was X versus Y, the kind
21 of quantification that NCR is asking for here? No. But what
22 we can say is that it is a substantial volume that in and of
23 itself would justify the cleanup as much as the Georgia-Pacific
24 main mill released and would justify the cleanup. So the two
25 mills in that respect are comparable, and there's no meaningful

1 way to distinguish between those mills. So if there's going to
2 be a pro rata allocation, at least in the part of the river
3 where it's conjoined, the two are equal. That will be our
4 position at trial in phase 2 on those issues. Consistent with
5 the facts.

6 And really, Your Honor, I think what NCR is really
7 concerned about is whether at trial somehow we come forward
8 with new facts, new information not disclosed in discovery,
9 whether in our initial disclosures or interrogatory answers or
10 whatever. That's addressed under Rule 37. That's not going to
11 happen. But that's really what the rules contemplate. Which
12 is if a party has not made an initial disclosure that was
13 required to be disclosed or hasn't supplemented its
14 interrogatory answers as discovery takes place, the party who
15 feels that they are prejudiced by that moves to exclude the
16 evidence under Rule 37 and the trial court at that point
17 considers whether there's substantial cause for the
18 late-disclosed fact and whether prejudice has occurred. That's
19 really -- they are sort of anticipating that sort of thing
20 happening and trying to prejudge that. But what they are
21 asking for now is not what anybody can provide, Your Honor.

22 *THE COURT:* All right.

23 *MR. SHEBELSKIE:* Thank you, Your Honor.

24 *THE COURT:* Thank you.

25 *MR. PARKER:* Judge, could I be heard?

1 **THE COURT:** Certainly.

2 **MR. PARKER:** Thank you. Judge, I just want to try to
3 make two points and make sure I understand in the context of
4 what has been discussed today --

5 **THE COURT:** Would you put your appearance on the
6 record so that -- we're keeping an oral record here.

7 **MR. PARKER:** I apologize. John Parker from
8 Baker & Hostetler on behalf of International Paper.

9 **THE COURT:** I know who you are.

10 **MR. PARKER:** I was going to say, Judge, unfortunately
11 I'm becoming one of your better customers, and I apologize for
12 that. And I want to make two points today and just try to get
13 a little bit understanding of your prior motion.

14 I will also add that I was under strict instructions
15 from Mrs. Parker to tell you thank you for giving me that week
16 extension for my vacation.

17 The first point I want to make --

18 **THE COURT:** Tell her she's welcome.

19 **MR. PARKER:** I will duly report that.

20 Really the only difference between the answers that
21 Georgia-Pacific has given in this case and those that
22 International Paper has given in this case as to the things
23 that Mr. Marriott is interested on behalf of NCR in finding
24 out, his chart for example, is that their answers are longer
25 than ours. They point to some more documents, admittedly, than

1 we do. Which you would expect, because as Mr. Shebelskie just
2 pointed out, they actually operated mills -- not all four of
3 their mills but some of their mills -- during the relevant
4 period of time.

5 To be clear, International Paper never operated a
6 mill at any point in time on the Kalamazoo River. Not for one
7 single day. Now, we acquired some companies that acquired some
8 companies that at one point owned a mill that they sold, but we
9 never operated a mill. We have as much knowledge of these
10 mills as NCR does. So, of course, our answers are shorter,
11 because we don't have as much record -- we don't have any
12 records, and we don't have the knowledge.

13 But in terms of the specific questions that NCR wants
14 with how much PCBs by year or by day, all those sorts of
15 things, our answers are similar. And I think that is the case
16 because the only way you can get any kind of more definition
17 than pointing to the documents is if you try to take the
18 knowledge that our experts have in this case and somehow give
19 that to NCR. This is what I understood at the end of the day
20 the last time we were here you're essentially ordering me to
21 do. And I don't think -- I think that's the only way we can
22 give more information or, frankly, Georgia-Pacific could give
23 more information of the kind that Mr. Marriott wants.

24 Now, if you think that Georgia-Pacific's answer that
25 they have given with the more information than we gave is

1 sufficient, I can incorporate those answers into mine and
2 comply then I think with your order. In other words, if you
3 rule today that what they have done is sufficient, I can go
4 back and point to all those same documents, incorporate all the
5 things that they have done and comply with your order. And if
6 that's what you are telling me I need to do, I will do it.
7 Because that is exactly what Georgia-Pacific has done.

8 In fact, if you look at page 4 of their brief, they
9 even point out that when NCR asked to identify by year and mill
10 the amount of CCP recycled at the site, they say they replied
11 since there's a lack of documentary evidence which precludes
12 precise statements about how much CCP each mill at the site
13 recycled for a given year, yet referred NCR to
14 Georgia-Pacific's proposed findings of fact from phase 1 and
15 voluminous records created by its contractors as part of the
16 site cleanup process, referred NCR to documents cited in
17 several of the previous mill owners' mediation questionnaire
18 responses, each of which cited hundreds of references
19 discussing each aspect of a mill's wastepaper usage. Even
20 provided a spreadsheet translating the Bates number references
21 in the mediation questionnaire responses to the Bates numbers
22 used in this litigation.

23 Additionally, Georgia-Pacific incorporated its
24 responses to Weyerhaeuser's interrogatories on the types and
25 sources of wastepaper furnish used at Georgia-Pacific's mill at

1 the site which identify numerous documents and depositions and
2 provided specific descriptions for each mill. We can do that,
3 Judge. If that's what you were ordering me to do the first
4 time around, we can do that. But what I understood to have
5 happened and what I understand Mr. Marriott to be asking for
6 today is that we somehow confer with our experts, get their
7 preliminary ideas of what each mill might have done in this
8 regard, assuming they can -- and, frankly, we don't even know
9 that they can do that yet because they are still working on
10 this -- and then that knowledge becomes International Paper's
11 knowledge or Georgia-Pacific's knowledge, if that's what you
12 order them to do, and they then disclose that we as parties,
13 because now we've got the knowledge of our experts, disclose
14 that over to NCR. And with all due respect, we think that
15 would be -- if that is what you were in fact suggesting we do,
16 we would think that would be inappropriate, and I would suggest
17 you should not do that to Georgia-Pacific today either.
18 Requiring us to confer with our experts and -- which would
19 somehow transmogrify their otherwise privileged opinions to
20 facts that we then disclose to NCR would really in my mind
21 violate the rule, if that's what we're being ordered to do,
22 that says that information remains privileged.

23 If my client were sued for making a defective part
24 and I went out and hired a consulting expert and he said -- he
25 looked at the part and he said, "Boy, you've got a problem,

1 Parker, that's a defective product," and he tells me and my
2 client that, my client, that's privileged. And even though my
3 client has received that information, he's under no obligation
4 to disclose that in discovery or otherwise. So the notion that
5 I would have to go try to glean this information from our
6 experts and then somehow disclose that -- again, if that is
7 what I was ordered to do, and I'm not sure I was -- I think
8 would be inappropriate. And if that's what NCR is asking for
9 again today, I think that would be inappropriate.

10 Also, if that's what I'm being asked to do, I think
11 it's unfair. It would be equally unfair to Georgia-Pacific.
12 Because it would change the timing of the scheduling order. In
13 the scheduling order the judge has not only given a date for
14 when expert opinions will be disclosed, he's also said it's
15 going to be done simultaneously. If --

16 *THE COURT:* What was going to be disclosed?

17 *MR. PARKER:* The expert opinions.

18 *THE COURT:* Okay.

19 *MR. PARKER:* So if I'm required to go glean from my
20 experts what they may say and disclose it now simply because I
21 got served with interrogatories by NCR or by the way they chose
22 to move against me first on a motion that appears to be
23 identical that brings us here again today, I'm going to have to
24 disclose those opinions before anybody else, that's a horrible
25 prejudice to my client and puts me at a big disadvantage in the

1 fact that I would have to go out and get those opinions.

2 Now, if where Your Honor is headed with this is that
3 it would be okay if International Paper had done the more
4 tedious discussion of the records that exist in this case -- by
5 the way, none of which are ours, none of which relate to mills
6 we operated -- we can do that. We can incorporate those by
7 reference. I just want to be sure, and I think I can glean
8 this from the context of what you ordered today, that I'm not
9 being asked to go talk to my experts, get their opinions, and
10 somehow relate those to NCR. Because I think that would be --
11 I think that would violate the rule. I also think it would be
12 grossly unfair because it would require me to do it, disclose
13 expert opinions, tentative as though they may be, before
14 everybody else would have to do it. Which is obviously not
15 what the scheduling order contemplates. So I'm just looking
16 for a little direction from the Court in terms of the ultimate
17 ruling that you would give today as to what I have to do.

18 **THE COURT:** I think what you're looking for, Counsel,
19 and you've already accomplished it, is to reargue the motion we
20 were here before on.

21 **MR. PARKER:** I would ever do that, Judge?

22 **THE COURT:** Would you ever? Not the third time. I
23 suspect you've already done it twice. I'm going to give the
24 other side two minutes to respond to this since you have. Go
25 ahead.

1 **MR. PARKER:** Thank you, Judge.

2 **MR. MARRIOTT:** Thank you, Your Honor. Well, look, I
3 think Your Honor hit the nail right on the head. What you just
4 heard, at least by counsel for International Paper, is a
5 complete reargument of what occurred last time. There's
6 nothing said that wasn't said before.

7 Your Honor then ruled last time as follows -- you
8 know what Your Honor ruled. But what you said quite clearly
9 was this wasn't about just pointing to documents. It wasn't a
10 Rule 33(d) issue. We didn't raise Rule 33(d). They raised
11 Rule 33(d). And what Your Honor said is that we were entitled
12 to have their contentions. It seems to me that NCR is entitled
13 to know what the other parties are going to be contending so
14 they know what they have to defend against. It seems to me
15 they are entitled to know that prior to the close of discovery.
16 And what counsel has just done is after having already appealed
17 Your Honor's decision to Judge Jonker, basically rearguing it
18 now, previewing what he's apparently going to say in front of
19 Judge Jonker again. We respectfully submit there's no basis
20 for -- especially where there never was even a motion for
21 reconsideration -- reconsideration of that order against which
22 we've all governed ourselves over the last several weeks. Nor,
23 frankly, Your Honor, I believe is there in principle
24 distinction between what Georgia-Pacific did and what
25 International Paper did. The difference, however, I think the

1 very important difference, which I think I just heard from
2 counsel for Georgia-Pacific, is that they don't have any
3 contentions of the kinds which we're seeking. Despite what
4 their papers say. Your Honor, in their papers, in their brief
5 in opposition to the present motion, after telling us it was
6 impossible to answer the questions, they say at page 6,
7 "Experts will address these topics soon." That, of course, is
8 our enormous concern. But what I just heard --

9 **THE COURT:** What was that word, please?

10 **MR. MARRIOTT:** "Experts will address these topics
11 soon."

12 **THE COURT:** And then you said?

13 **MR. MARRIOTT:** Well, I guess I'm not entirely sure
14 what I said, Your Honor.

15 **THE COURT:** Tell me about your concern.

16 **MR. MARRIOTT:** Yeah, our concern is that they are
17 going to do with their expert reports, reveal the contentions
18 that they are otherwise unwilling to reveal. But it sounds
19 like that's not the case. What I heard counsel to say is they
20 do not intend during phase 2 of the case to present expert or
21 any other evidence that speaks to the amount of carbonless copy
22 paper recycled at any given mill in any given year. What they
23 intend, it sounds like, instead to say is that they already won
24 the case in phase 1, it's over, and NCR ought to be held
25 responsible based on the record that was already presented.

1 Now, as you might imagine, I respectfully disagree
2 with that version of the world, but they are entitled, I
3 suppose, to make that argument to Judge Jonker. What we
4 believe they are not entitled to do is now having given us no
5 real answer to our questions in terms of what their contentions
6 are, having now said they aren't going to submit evidence
7 expert or otherwise to answer those questions at trial, then
8 later do it. I think I perhaps have my record, Your Honor.
9 Counsel has said what counsel said. I understand they are not
10 going to submit evidence in this regard. My concern apparently
11 was misplaced. I think we have the contentions. In other
12 words, there won't be any contentions on these points. And
13 that seems fundamentally to differentiate from
14 International Paper which clearly has such contentions.

15 *THE COURT:* Thank you.

16 Counsel, do you want to respond to his last comment?
17 Is that in fact your contention or lack of contention?

18 *MR. SHEBELSKIE:* We will respond to whatever
19 contention that they make. They haven't disclosed what their
20 divisibility argument is.

21 *THE COURT:* Well, assuming they don't make any
22 contentions.

23 *MR. SHEBELSKIE:* If they don't make any contention on
24 this topic, we're not going to put on mill-by-mill year-by-year
25 specification of the amounts of paper recycled at each mill and

1 the amount of PCBs discharged by each mill. Our position is,
2 as I stated as it was in phase 1 and as I stated here today,
3 that various of the recycling mills recycled during the
4 20-or-so-year period a substantial quantity of PCBs-containing
5 paper and discharged substantial quantities each alone
6 justifying the cleanup. So they are all equal in that respect.
7 That's our position.

8 *THE COURT:* Thank you.

9 *MR. MARRIOTT:* It sounds to me, Your Honor -- let's
10 parse that answer a little bit. All right. So counsel says --
11 counsel says that they are not going to present anything. That
12 gives me great assurance. But if what he's saying is the
13 moment that an NCR expert or any other party's expert --
14 because the mills are going to be duking it out, so to speak,
15 among themselves -- but the moment Mr. Parker's expert says for
16 a given mill which is the amount of carbonless copy paper we
17 project was recycled at that mill, in order to differentiate
18 IP's mills from GP's mills or other mills from one another,
19 then he is going to open his mouth by way of expert and they
20 are going to have all sorts of things to say about the issue.
21 If I misheard, then I'm sure they will tell me. But it sounds
22 like they are saying, "We're not taking any position until we
23 take a position." We're not -- so they do, it seems, have a
24 position. They are just going to wait and do it. An even
25 worse stage, right? So we won't get it with the initial expert

1 reports when they are due on November 17th. What it sounds
2 like he's saying is, "You won't hear from me then, but I'm
3 going to wait and see what you all say and then I'm going to
4 come roaring in and then you're going to hear what I have to
5 say about every one of these mills because I'm going to say
6 your guys are all dead wrong and the only way I can prove your
7 guys are dead wrong is by having my guys tell you what the real
8 answer ought to be." If he's not saying that, then perhaps we
9 have no issue. If he is saying that, then I think we're right
10 back to where we started.

11 **MR. SHEBELSKIE:** Let me clarify, if I could. It
12 seems like one of those arguments I have at home: Every time I
13 open my mouth, it gets worse. But what I meant by that latter
14 statement, just to set NCR's counsel's mind at ease, is that if
15 they come forward with an expert who says, "Oh, we know for
16 mill A that in year 1 they recycled X tons and in year 2 it was
17 Y tons and year 3 Z tons," certainly we're going to attack
18 that. We're going to say that's not a reliable calculation.
19 You're relying on insufficient data. You're relying on faulty
20 assumptions. Nobody can make that kind of specification.
21 That's what I meant by we would attack the specifics of their
22 contentions.

23 **THE COURT:** Because you're going to say no one can
24 make those estimates?

25 **MR. SHEBELSKIE:** Exactly.

1 **THE COURT:** Okay.

2 **MR. MARRIOTT:** And so, Your Honor, if he's not saying
3 "We have an alternative view to offer," then I think I have the
4 on-the-record acknowledgment that they have no position on
5 these things that I need except that one can't possibly know
6 the answer.

7 **THE COURT:** I think you heard what he said.

8 **MR. MARRIOTT:** I did. Thank you.

9 **THE COURT:** All right. Back to Mr. Parker. I
10 appreciate Mr. Parker's attempt to reargue this motion,
11 particularly when it's already on appeal to Judge Jonker.
12 Never lose an opportunity.

13 **MR. PARKER:** Thank you, Judge. Judge, could I just
14 add one thing too?

15 **THE COURT:** No. You've already gotten the argument a
16 second time. And I'm sorry, I don't mean to be rude to you.

17 **MR. PARKER:** No, you're not. You've been
18 accommodating. I appreciate that.

19 **THE COURT:** And I was about to amend my order
20 regarding Rule 30(b)(6) as far as having an attorney -- I was
21 referring to litigation attorneys -- and yet be your 30(b)(6)
22 witness. But I suppose you're not going to have your
23 litigation attorney be a 30(b)(6) witness just to eliminate an
24 unnecessary problem.

25 **MR. PARKER:** Correct.

1 **THE COURT:** Actually, a true 30(b) (6) witness if they
2 have a privilege can raise it, but I don't want to create
3 artificial problems. That was what I was referring to in that
4 order. And you're free to appeal that as you did. But that's
5 what I was referring to.

6 I don't want to reargue that motion. IP was
7 apparently not a no operator. And while I came in here loath
8 to be in a position where I might give what would appear to be
9 inconsistent rulings, we have inconsistent positions here
10 because the answers are different, the parties are in somewhat
11 different positions. The decision regarding
12 International Paper was given within the context of that
13 hearing. The arguments made at that time. And the Court was
14 persuaded that contention interrogatories were a subset or a
15 part of or perhaps an adequate substitute for interrogatory
16 answers that were otherwise not forthcoming. They were a
17 lesser answer. And I think there was the talk about 4 million
18 pages of documents that had been proffered and that was not an
19 acceptable answer. But rather than attempt to require a
20 tremendous amount of factual information, what Georgia-Pacific
21 was really after were the contentions of the parties, and so I
22 was persuaded that if International Paper came forward with its
23 contentions so that Georgia-Pacific knew what those were, that
24 would be an adequate way of resolving that and that was the
25 basis of my ruling.

1 I'm not sure I directly said how those contentions
2 were to be arrived at, but nevertheless that ruling stands.
3 Unless, of course, Judge Jonker sees otherwise. And I don't
4 want to revisit that at this time. I'm always happy to hear
5 Mr. Parker's arguments. They are articulate and erudite, and I
6 enjoy Mr. Parker's presence in court.

7 **MR. PARKER:** Thank you.

8 **THE COURT:** I'm glad his wife allowed him to come
9 back. And I think we're all better off for hearing the
10 arguments. But nevertheless, I'm not going to revisit that
11 ruling. The ruling stands.

12 And this situation is a little bit different because
13 here we have a number of factual answers given, and I think
14 that during the course of our exchange here a lot of what
15 Georgia-Pacific is concerned about may have been alleviated by
16 the representations of opposing counsel as to what its
17 contention really is.

18 So I don't know at this point, Counsel, do you want
19 to pursue your argument?

20 **MR. MARRIOTT:** Well, Your Honor, let me just -- I
21 think what I want -- what I believe is the case, Your Honor, is
22 that counsel's position -- we talked really principally about
23 interrogatory number 1, and I guess I infer from the discussion
24 that their position is really the same with respect to the
25 other interrogatories. And if that's true and what they are

1 saying is we're not going to offer evidence that isn't in those
2 interrogatories at trial, then I have no problem.

3 *THE COURT:* Counsel?

4 *MR. SHEBELSKIE:* That's the case, Your Honor.

5 *MR. MARRIOTT:* Fine.

6 *THE COURT:* All right.

7 *MR. MARRIOTT:* Apparently I may have missed
8 something, Your Honor. Give me just one second.

9 *THE COURT:* Certainly.

10 *MR. MARRIOTT:* But counsel wisely points out we would
11 nevertheless like a ruling so that we have the benefit of
12 judicial estoppel in the event that someone decides on the
13 other side that they want to rethink the positions taken today.

14 *THE COURT:* Well, Mr. Fields' counsel is always well
15 taken. I'm going to deny the motion at this point. I believe
16 that the -- as I said, the Court sits to rule on the
17 interrogatories as they are written. And these are factual
18 requests, and I believe factual answers have been given. They
19 have incorporated other references to other documents, but
20 there's no objection as to those devices. I think that's very
21 professional by Georgia-Pacific not to object to those because
22 of the nature and the extent of the other documents that are
23 being incorporated. So the position taken by the responding
24 party is that they can't answer these questions further than
25 what they have provided and they are not going to try to come

1 up with answers that they think are impossible and they are
2 going to point that out if anybody else tries to come up with
3 more specific answers. Their position is you can't figure this
4 stuff out. It's just simply impossible at this stage. So I
5 think these answers are probably pretty good attempts to answer
6 these interrogatories as they are asked.

7 As I pointed out, these are not strictly speaking
8 contention interrogatories. Not to say those could not be
9 asked. Contention interrogatories, of course, are perfectly
10 proper. These simply are not such. And there's more time for
11 those if the parties really wanted to I suppose ask those. So
12 I'm going to deny the motion. I'm not going to get to the
13 issue of whether or not these are relevant. That's another
14 objection to these. Because the issue of divisibility and so
15 forth, I don't think I need to rule on that. And we'll save
16 that for another day, and that's something else Judge Jonker
17 can rule upon at an appropriate time. So this ruling does not
18 reach that issue. All right. I think that's it.

19 *MR. SHEBELSKIE:* Your Honor, may I raise a
20 housekeeping matter?

21 *THE COURT:* Certainly.

22 *MR. SHEBELSKIE:* Thank you. Georgia-Pacific filed
23 this morning a Motion to Compel against NCR and
24 International Paper. It's a discrete issue. It concerns a
25 production of documents that the two parties received from the

1 Missouri -- Missouri -- the Michigan Department of
2 Environmental Quality. It is -- I hesitate to say this in a
3 case with so many lawyers, it really is a five-, 10-minute
4 argument, and we are asking for expedited consideration of that
5 because the deposition of the Missouri Department of
6 Environmental Quality is scheduled for October 29th, and so we
7 certainly would like -- we've requested, they won't produce the
8 documents, and that's why we have the Motion to Compel. We
9 would like to have the documents obviously in advance of the
10 deposition in order to use them at the deposition so we don't
11 have to postpone it for that reason. So I was inquiring
12 whether it would be possible to even arrange a telephonic
13 conference on that so all the parties -- after you read the
14 motion if you think it's appropriate to do so by that means,
15 whether we could arrange something if not later this week, next
16 week on that. I don't know if the Court does that as a matter
17 of practice or not.

18 **THE COURT:** As a matter of practice never.

19 **MR. SHEBELSKIE:** Oh.

20 **THE COURT:** So just to put your mind at rest on that.
21 I detest motions over the telephone for a variety of reasons.
22 One of which is it's very, very hard to accomplish that without
23 people talking over each other or my not being able to
24 interrupt parties because they keep right on talking and they
25 can't hear me. Apparently our electronics don't allow for

1 that. That's not to say we wouldn't -- I shouldn't say
2 never -- but very rarely. So number 1.

3 Number 2, I don't -- you said that was just filed
4 today?

5 *MR. SHEBELSKIE:* Yes, sir.

6 *THE COURT:* It seems like I got something yesterday
7 or the day before. Another black binder came in. Is there
8 another motion pending out there besides that?

9 *MR. SHEBELSKIE:* Oh, yes, there is. Georgia-Pacific
10 has filed another Motion to Compel, and that's scheduled for
11 hearing the 29th or 30th of October.

12 *THE COURT:* All right. Maybe that's the one I'm
13 thinking of. So you've filed another one yet today?

14 *MR. SHEBELSKIE:* Yes, sir.

15 *THE COURT:* All right.

16 *MR. MARRIOTT:* Your Honor, I haven't read what was
17 filed today, but I'm confident it wouldn't yet have been
18 referred to Your Honor, so it may be for that reason.

19 *THE COURT:* First of all, it has to be referred to
20 me. That would be number 1. Today is my criminal duty week
21 which is already pretty well booked up. Even if I were to get
22 a response in this week -- and I will be in New York next week
23 at the direction of my wife, so I know I will not be -- that's
24 reason number 2 we're not going to do this next week I'm
25 afraid.

1 When is your hearing -- or your deposition?

2 **MR. SHEBELSKIE:** It is noticed for October 29th. I
3 don't -- that's all I know. I mean, obviously there's a
4 possibility that gets postponed by -- at the request of the
5 deponent, but that's all I know right now.

6 **THE COURT:** Well, that leaves us -- did you say the
7 29th?

8 **MR. SHEBELSKIE:** Yes, sir.

9 **THE COURT:** That gives us two weeks after next --
10 let's see, no, that gives us one week after next week. That
11 gives us the week of the 21st. It seems like we might be able
12 to schedule something that week.

13 **MR. SHEBELSKIE:** That would be much appreciated,
14 Your Honor.

15 **THE COURT:** Let me look at the motion. Is it one we
16 have to have an oral argument on?

17 **MR. SHEBELSKIE:** I think we could elect to bypass
18 that, yes, Your Honor.

19 **THE COURT:** You don't know what it is yet?

20 **MR. MARRIOTT:** I haven't read it, but I'm certainly
21 open to that.

22 **THE COURT:** All right. Well, I'll look at it, and
23 the parties can give me their opinion as to whether or not they
24 want to have oral argument. I won't rule out a possibility of
25 a telephone argument. But if all these parties want to be

1 involved, that makes it even more difficult. So -- and the
2 other argument was set for what date? You said -- we set it
3 yesterday.

4 **MR. SHEBELSKIE:** I think it may be the 30th of
5 October, Your Honor.

6 **THE COURT:** Well, that would be the day after, so
7 that wouldn't be.

8 All right. Well, stay in touch with our office, and
9 we'll try to accommodate you.

10 **MR. SHEBELSKIE:** Thank you, Your Honor.

11 **MR. MARRIOTT:** Thank you, Judge.

12 **THE COURT:** Thank you.

13 **THE CLERK:** All rise. Court is adjourned.

14 *(Proceeding concluded at 11:13 a.m.)*

15 * * * * *

16 CERTIFICATE

17 I certify that the foregoing is a transcript from the
18 Liberty Court Recording System digital recording of the
19 proceedings in the above-entitled matter, transcribed to the
20 best of my ability.

21

22 October 13, 2014

23

24 /s/ Glenda Trexler
25 Glenda Trexler, CSR-1436